STATE OF MICHIGAN

COURT OF APPEALS

ROBERT LANE, Plaintiff-Appellant,	UNPUBLISHED October 16, 2003
v	No. 240565 Oakland Circuit Court
ADDISON COMMUNITY PHYSICIAN SERVICES ASSOCIATION, Defendant-Appellee.	LC No. 99-015089-CZ

Before: Kelly, P.J., and Cavanagh and Talbot, JJ.

PER CURIAM.

Plaintiff, in a shareholder capacity, brought this action against defendant, a nonprofit corporation, under the Nonprofit Corporation Act (NCA), MCL 450.2101 *et seq*., alleging wilfully unfair and oppressive acts. Following plaintiff's presentation of proofs at a bench trial, the court granted defendant's motion for involuntary dismissal. Plaintiff appeals as of right. We affirm.

I. Facts

Plaintiff and Randall Pittman were defendant's sole shareholders when defendant corporation was formed in 1994, for the purpose of supplying medical staff to a for-profit healthcare business. Pittman was the majority shareholder, as well as a director and the president. Plaintiff also was an officer and director of the corporation until he resigned in 1998. According to defendant's articles of incorporation, the corporation was formed for the purpose of "provid[ing] quality professional services to the patients and communities served by the healthcare facilities at which the Corporation's employees are members of the medical staff." To effectuate this purpose, defendant entered into contracts with medical professionals and directed where they would work. In practice, the medical professionals were hired to provide services in the field of bariatric surgery for obese persons at a health facility operated through for-profit corporations owned by plaintiff and Pittman. Plaintiff and Pittman decided to form defendant under the NCA after determining that Michigan law prohibited for-profit corporations owned by nonphysicians from employing physicians or owning an interest in a physician's group practice.

Plaintiff filed the instant action in May 1999, after Pittman arranged to hold a special shareholder's meeting for the purpose of voting on whether to convert defendant from a stock to a directorship-based nonprofit corporation under the NCA. Plaintiff sought to have the

conversion declared invalid, to obtain an annual shareholder's meeting, and to obtain corporate records. In October 2000, the trial court granted partial summary disposition to defendant under MCR 2.116(C)(10), holding that the conversion complied with statutory requirements. The court allowed plaintiff to proceed with an unpleaded claim alleging "wilfully unfair and oppressive" acts under MCL 450.2825, but was not presented with plaintiff's second amended complaint alleging this claim until the February 2002 bench trial. After the close of plaintiff's proofs at the trial on the question of liability, the court entered its order of involuntary dismissal. This appeal followed.

II. Involuntary Dismissal

We will consider plaintiff's first two issues on appeal jointly because they both pertain to the trial court's decision granting defendant's motion for involuntary dismissal after the close of plaintiff's proofs. Although the court referred to defendant's motion as having been brought under MCR 2.504(B)(2), it specifically stated that it was giving every benefit of doubt, and considering the evidence in a light most favorable, to plaintiff. Because the substantive standard applied by the trial court is the standard applicable to a motion for a directed verdict under MCR 2.515, we will review the court's decision in this light. *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 326-327; 657 NW2d 759 (2002). We review a trial court's decision granting a directed verdict de novo. *Smith v Jones*, 246 Mich App 270, 273; 632 NW2d 509 (2001).

Viewing the trial evidence, including the parties' stipulations, in a light most favorable to plaintiff, we agree that plaintiff failed to establish a claim for wilfully unfair and oppressive acts to a shareholder under MCL 450.2825. In considering this issue, we shall assume for purposes of our review that defendant was lawfully converted to a directorship-based nonprofit corporation in May 1999, inasmuch as this particular question was resolved as part of the trial court's pretrial ruling granting partial summary disposition in favor of defendant.

The essential question that we must decide is whether the conversion, even though lawfully based on action taken at a special shareholder's meeting, can nonetheless be deemed a wilfully unfair and oppressive act by the controlling shareholder, Pittman, because plaintiff was not compensated for his shares of stock. In considering this issue, we note that other economic benefits that plaintiff might have enjoyed on account of his status as an officer and director had already been extinguished by plaintiff's resignation in 1998. Additionally, the pertinent inquiry is whether plaintiff should have received direct compensation from defendant when the conversion took place, as distinguished from indirect benefits that may have been received by the for-profit corporations that plaintiff owned with Pittman. Finally, we note that Pittman, like plaintiff, received no compensation as a shareholder for his shares of stock when the conversion took place.

Had this been a case where defendant was formed under the Business Corporation Act, MCL 450.1101 *et seq*., our review would be aided by MCL 450.1489(3), as amended in 2001, which expressly defines "willfully and oppressive conduct" as

> a continuing course of conduct or a significant action or series of actions that substantially interferes with the interests of the shareholder as a shareholder. The term does not include conduct or actions that are permitted by an agreement, the

articles of incorporation, the bylaws, or a consistently applied written corporate policy or procedure.

As applied to this case, we note that the Legislature is presumed to know existing laws on the same subject when exacting new laws. *Nummer v Dep't of Treasury*, 448 Mich 534, 553 n 23; 533 NW2d 250 (1995). A statutory amendment may reflect a change in or clarification of its meaning. *Ettinger v Lansing*, 215 Mich App 451, 455; 546 NW2d 652 (1996). But a court "cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." *Alma Piston Co v Dep't of Treasury*, 236 Mich App 365, 370; 600 NW2d 144 (1999), quoting *Farrington v Total Petroleum, Inc*, 442 Mich 201, 210; 501 NW2d 76 (1993).

Because the Legislature did not adopt a comparable definition for the NCA, we apply ordinary principles used to construe undefined statutory language when considering plaintiff's claim that defendant's conversion to a directorship-based nonprofit corporation may be deemed a willfully unfair and oppressive act within the meaning of MCL 450.2825. As such, we begin by consulting the plain and ordinary dictionary meaning of the pertinent terms. *Koontz v Ameritech Services, Inc*, 466 Mich 304, 312; 645 NW2d 34 (2002). The meaning of "wilfully" or "willfully" encompasses "deliberate, voluntary, or intentional" acts. *Random House College Dictionary* (2d ed, 1997). "Unfair" means "not fair; not conforming to standards of justice, honesty, or the like" and "beyond what is proper and fitting; disproportionate." *Id*. "Oppressive" means "1. burdensome, unduly harsh, or tyrannical. 2. causing discomfort. 3. distressing or grievous." *Id*.

So construed, we cannot conclude that the plain and ordinary dictionary meaning of the words used by our Legislature support the "reasonable expectations" standard suggested by plaintiff, or considered by the trial court, for a shareholder's claim of wilfully unfair and oppressive acts under the NCA. The statutory language reflects a broader test dependent on disproportionate, harsh acts that are deliberately directed at a minority shareholder. Each word and phrase in a statute should be given effect. *Koontz, supra* at 312. Although broad, we conclude that there is no facial ambiguity in the statutory language. It does not establish a "reasonable expectations" test.

But a statute can also require judicial construction because it is ambiguous, as applied to facts in a particular case. See *Elias Bros Restaurants, Inc v Dept' of Treasury*, 452 Mich 144, 150-151; 549 NW2d 837 (1996); *In re Forfeiture of $5,264*, 432 Mich 242, 249; 439 NW2d 246 (1989). To the extent that a shareholder's reasonable expectations provide a means for identifying and measuring oppressive conduct, there is merit to plaintiff's claim that a shareholder's reasonable expectations may be relevant. *In re Kemp & Beatley, Inc*, 64 NY2d 63, 71-72; 484 NYS2d 799; 473 NE2d 1173 (1984). However, we may not ignore the statutory requirement that challenged conduct also be unfair. Hence, the validity of the action taken at the special shareholder's meeting to convert defendant to a directorship-based nonprofit corporation, as well as its proportionate effect on all shareholders, in their capacity as shareholders, remain relevant considerations.

Nonetheless, viewed most favorably to plaintiff, the evidence failed to establish the "oppressive" requirement necessary to sustain plaintiff's cause of action. The trial court correctly determined that plaintiff's expectation that he would directly profit as a shareholder

was unreasonable in light of the NCA's prohibition against pecuniary profit or gain by shareholders of a nonprofit corporation. MCL 450.2108(3), 450.2301. People are presumed to know the law. *Adams Outdoor Advertising v East Lansing*, 463 Mich 17, 27 n 7; 614 NW2d 634 (2000). Expectations that contravene well-settled law are unreasonable. *Willis v Bydalek*, 997 SW2d 798, 803 (Tex App, 1999). Because plaintiff cites no basis under the NCA, or the articles of incorporation or bylaws, supporting a reasonable expectation of compensation for his stock shares, and because the NCA expressly prohibits pecuniary profit or gain by shareholders, his alleged expectation of economic benefit cannot be considered reasonable. Cf. *Gee v Blue Stone Heights Hunting Club, Inc*, 145 Pa Commw 658; 604 A2d 1141 (1992). Hence, we affirm the trial court's decision granting defendant's motion for dismissal.

III. Summary Disposition

Plaintiff also claims that the trial court erroneously granted summary disposition in favor of defendant because genuine issues of material fact existed with regard to whether defendant violated the NCA and the common law by refusing to hold annual shareholders' meetings, refusing to provide him with access to corporate records, and failing to investigate alleged self-dealing by the majority shareholder. Having considered each of these claims, we find no basis for relief.

Plaintiff's claim regarding defendant's failure to hold annual shareholders' meetings is not properly before this Court because it is given only cursory treatment in plaintiff's appeal brief. *Eldred v Ziny*, 246 Mich App 142, 150; 631 NW2d 748 (2001). Further, plaintiff's failure to address the basis for the trial court's ruling precludes appellate relief. See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 113; 413 NW2d 744 (1987). Regardless, we note that the record reflects that the trial court specifically addressed this issue following plaintiff's proofs at the bench trial, rather than as part of its pretrial ruling partially granting summary disposition to defendant. The court ruled that plaintiff had failed to establish a need to compel a shareholders' meeting. Considering that defendant had no shareholders when the trial court rendered its decision, we find no error. Even assuming that the conversion of defendant to a directorship-based nonprofit corporation did not preclude the trial court from ordering an annual shareholders' meeting under MCL 450.2402, "[t]he law does not require the doing of a useless act." *Modern Globe, Inc v 1425 Lake Drive Corp*, 340 Mich 663, 669; 66 NW2d 92 (1954).

Plaintiff's claim regarding his access to corporate records was also specifically addressed by the trial court as part of its decision at the bench trial. The trial court ruled that the subject records had either been produced or that plaintiff had abandoned this claim by not presenting proofs regarding the issue. Because plaintiff does not dispute in his reply brief that he received the subject records, we conclude that this issue is moot and, accordingly, decline to address it. See *B P 7 v Bureau of State Lottery*, 231 Mich App 356, 359; 586 NW2d 117 (1998).

We also decline to address plaintiff's claim regarding defendant's alleged failure to investigate self-dealings of the majority shareholder. We deem this claim abandoned because plaintiff has failed to brief it. See *People v Kent*, 194 Mich App 206, 209-210; 486 NW2d 110 (1992).

Plaintiff's other arguments concerning the validity of defendant's conversion to a directorship-based nonprofit corporation, the number of shares that he owned, and the transferability of his shares are not properly before us because they are not set forth in the statement of the question presented. See MCR 7.212(C)(5); *Meagher v McNeely & Lincoln, Inc*, 212 Mich App 154, 156; 536 NW2d 851 (1995).

In any event, limiting our review to the record before the trial court when it granted partial summary disposition to defendant, plaintiff has not established any basis for disturbing the trial court's decision. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the plaintiff's claims. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). Here, plaintiff failed to provide factual support for his position that defendant's conversion to a directorship-based nonprofit corporation violated the NCA. The approved resolution at the special shareholders' meeting to amend and restate the articles of incorporation, but to allow for the ministerial filling in of blanks to state the current value of the assets, did not render the conversion invalid. See MCL 450.2602(k). Although MCL 450.2202(e) requires a statement of value, the task of filling in the blanks to state current values was not a material aspect of the amendment. See MCL 450.2602(k), 450.2641(2). Also, even if a shareholder vote is required for restated articles of incorporation containing specific monetary values for assets, the trial court correctly determined that there was no evidence that this would have affected the vote with regard to the resolution. As noted previously, "[t]he law does not require the doing of a useless act." *Modern Globe, Inc, supra* at 669. Further, the filing of the restated articles of incorporation was conclusive evidence that all condition precedents had been fulfilled. See MCL 450.2221. As such, we are not persuaded that plaintiff has shown any notice deficiency upon which to invalidate the conversion.

Nor are we persuaded that plaintiff has established any basis in either the NCA or the amended bylaws for selecting directors that would invalidate defendant's conversion to a directorship-based nonprofit corporation. Further, plaintiff has not established any basis for disturbing the trial court's determination that he waived any alleged notice defect regarding the special shareholders' meeting. It was not enough that plaintiff generally object to the meeting. Rather, MCL 450.2404(3) required that plaintiff attend the meeting for "the express purpose of objecting . . . because the meeting is not lawfully called or convened." The statutory use of the definite article "the" before "express purpose" contemplates that a shareholder must appear at the meeting for the specific purpose of objecting on the basis that the meeting was not lawfully called or convened. See *Robinson v Detroit*, 462 Mich 439; 461-462; 613 NW2d 307 (2000). Hence, the trial court correctly determined that plaintiff's active participation in voting at the special shareholders' meeting constituted a waiver.

Furthermore, even if there was no waiver, we would affirm because the trial court reached the right result. See *Middlebrooks v Wayne Co*, 446 Mich 151, 166 n 41; 521 NW2d 774 (1994); *Lane v KinderCare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998). In addition to evidence that a new vote would be a useless act, we agree with defendant's position that plaintiff failed to establish evidence of a notice deficiency within the meaning of MCL 450.2611(3). Indeed, we note that plaintiff did not claim a "notice" deficiency until presented with defendant's motion for summary disposition. Pursuant to MCL 450.2404(3), to properly avoid a waiver, plaintiff should have objected on the basis of a deficiency contemplated by MCL 450.2611(3) at the time of the special shareholders' meeting.

With regard to the number of plaintiff's shares of stock at the time of the conversion, we note that this issue was decided by the trial court as part of its pretrial ruling granting partial summary disposition in favor of defendant. However, as conceded by plaintiff in his reply brief, whether he owned 300 or 333-1/3 shares of stock was not material. Hence, we decline to address it. See MCR 2.613(A).

Finally, we conclude that the trial court correctly found no genuine issue of material fact with regard to whether plaintiff's shares were transferable. MCL 450.2303(4) provides that, "[e]xcept as otherwise provided by the articles or bylaws, shares of stock shall not be transferable and shall be canceled upon the death or resignation of the owner of the shares." Because this statute is unambiguous, it must be applied as written. See *Koontz*, *supra* at 312. Applying general principles for construing contracts, we read MCL 450.2303(4) in harmony with defendant's articles of incorporation and bylaws. See, generally, 8 Fletcher, Cyclopedia Corporations, § 4195, p 791 (bylaws are construed under the same rules applied by courts to construe contracts), and *Cruz v State Farm Mut Auto Ins Co*, 466 Mich 588, 599; 648 NW2d 591 (2002) (as a principle of contract construction, a court will harmonize agreed-upon terms with statutory requirements). As noted previously, people are presumed to know the law. *Adams Outdoor Advertising*, *supra.* Here, neither the bylaws nor the articles of incorporation contain language that can reasonably be construed as providing for the transferability of defendant's shares of stock. As such, the trial court correctly held, as a matter of law, that the stock shares were not transferable. See *Henderson v State Farm Fire & Cas Co*, 460 Mich 348, 353; 596 NW2d 190 (1999); *Conagra, Inc v Farmers State Bank*, 237 Mich App 109, 132; 602 NW2d 390 (1999).

IV. Disqualification of Defendant's Attorneys

Plaintiff also claims that the trial court erred in determining that he waived any alleged conflict of interest arising from defendant's representation by his former attorneys. Because plaintiff gives only cursory treatment to this issue in his brief, we need not address it. See *Eldred*, *supra*. We note, however, that plaintiff has misconstrued the trial court's reasons for denying his motion. Fairly read, the record does not reflect that the trial court found that plaintiff executed a written waiver of the alleged conflict of interest. Rather, the record reflects that the court made a specific inquiry into the matter, affording plaintiff an opportunity to explain his delay in moving for disqualification, and that it also considered the procedural history of the case.

A party's failure to timely assert a right in a proceeding can constitute a "waiver." *Reno v Gale*, 165 Mich App 86, 90; 418 NW2d 434 (1987) (discussing the disqualification of a trial judge). Regardless of whether either "waiver' or "laches" is the appropriate label to apply to the trial court's ruling, we conclude that plaintiff has not established any basis for disturbing the court's denial of his motion for disqualification. See *In re Valley-Vulcan Mold Co*, 237 BR 322, 337-338 (CA 6, 1999); *Alexander v Primerica Holdings, Inc*, 822 F Supp 1099, 1115 (D NJ, 1993). Plaintiff has not shown that failure to grant relief would be inconsistent with substantial justice. See MCR 2.613(A); *Feaheny v Caldwell*, 175 Mich App 291, 309; 437 NW2d 358 (1989).

V. Discovery and Evidentiary Rulings

We decline to consider plaintiff's last two claims concerning discovery and evidentiary rulings because these claims are given only cursory treatment in plaintiff's appeal brief, with no citation to their factual basis in the record. See *Eldred*, *supra*; *People v Norman*, 184 Mich App 255, 260; 457 NW2d 136 (1990).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Mark J. Cavanagh
/s/ Michael J. Talbot